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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-318

Joseph F. Shanahan,

Robert J. Cornell, Petitioners

v.

New Jersey State Board of Education, et al.,
Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

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PETITIONERS' REPLY MEMORANDUM

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On Petition for a writ of certiorari to the Superior Court of New Jersey (Appellate Division)

PETITIONERS' REPLY MEMORANDUM

Respondent, Attorney General in the opening sentence of the Counter-Statement of the Case in Brief in Opposition makes the following error of incompleteness in stating: "This is a petition for writ of certiorari by two individuals who seek a ruling that N.J.S.A. 18A:14-62 precludes challengers in New Jersey school elections

from taking with them after the election is over informal poll lists they may have compiled during the day of election."

This describes the opening complaint but it omits to state that it was completely determined by the directive of the Commissioner dated 11 May 1972 ordering the destruction of such lists pursuant to N.J.S.A. 18A:14-18 (Petition, App. D, p. 44) and affirmed by the State Board of Education in November 1972. (Petition, p. 7). If that had been enforced as it should have been there would have been no need for further complaints by petitioners, which are evidenced by the fact that a new hearing was held by the Commissioner and appeal to the State Board which resulted in the Decision of the State Board of Education, dated March 6, 1974 (Petition, App. C, p. 40) which is the basis of the continuing appeal. This correction shows that petitioners are not seeking any ruling in the present complaint. They are seeking an enforcement of the Commissioner's directive. The reason that petitioners must clarify this point is that it does bear directly on the question of one of the administrative procedural errors listed in the Petition. (Petition, p. 23, par. D #1)

Certain other errors of fact, omission and paraphrasing are present in the Counter-Statement which, when taken together tend to give the misleading impression that the interpretation of N.J.S.A. 18A-62 is the basic factor in this

case. They are listed as follows:

ERRORS IN COUNTER-STATEMENT OF THE CASE

Error #1 - This is an error of fact and is most important to a clarification of the controversy since the question of its accuracy in regard to which statute was cited by the Commissioner is essential to the basic argument in the case, and which error is evident from the following:

Statement of the Attorney General (Counter-Statement, p.2)	Decision of Commissioner (11 May 1974) (Petition, p. 44)
In that opinion (May 11, 1972) the Commissioner concluded that it would not be improper for a challenger to prepare an informal poll list but that such a list would have to be destroyed following the election pursuant to N.J.S.A. 18A:14-62	"Therefore, any further use of a list of voters' names subsequent to the closing of the polls after a school election would be improper and a usurpation of authority given to challengers pursuant to N.J.S.A. 18A:14-18, Supra. The Commissioner directs therefore that any such list compiled be destroyed.

This patent error which cannot be discounted as a harmless one of transcription

or proof reading since it carries over into the argument on the merits and by implication into the decision of the state court. It also explains respondent's consistent adhering to the argument that the issue had to do with the interpretation of N.J.S.A. 18A:14-62 (the poll list statute) in the face of petitioners' contention that the original directive of the Commissioner (May 1972) was pursuant to N.J.S.A. 18A:14-18. (the challenger statute) (Petition, p. 18, par. 2). As further evidence that this misreading or apparent oversight has been present from the inception of the litigation, is the fact that that particular statute has never been included in any listing of Cases Cited in any of respondent's opposing briefs including this one. Since it is the underlying statute in the Commissioner's original decision, logically it should have called for some comment, in rebuttal.

Error #2 - This involves an error of omission in the Counter Statement found in the next to last sentence on page 2 of the opposing brief and evidenced by the following:

Statement by the Attorney General (Opposing Brief, p.2)	Pertinent excerpt of the holding by the Commissioner, as stated in the Decision of The State Board (Petition, p. 42)
"Upon reconsideration of this question in connection with Shanahan's petition, the Commissioner overruled his earlier decision requiring destruction of informal poll lists, concluding in effect that N.J.S.A. 18A:14-62 applies only to official poll lists, and dismissed Shanahan's petition."	"Although a logical extension of the Shanahan decision might at first seem to require banning the use of what is essentially a duplicate of the official poll list as compiled by a challenger, the Commissioner finds in this short time since the Watchung decision, that such a directive is unenforceable."

The fact is that the above "overruling" was one in name only, since it was not reversed by overwhelming argument but was "overruled" on the ground of unenforceability only, which in effect amounts to its reaffirmance on the merits, including the statute cited. (N.J.S.A. 18A:14-18). The inclusion of the ground for the overruling negates any conclusion relative to

N.J.S.A. 18A:14-62.

Error #3 - This is an error of paraphrasing made by respondent in the Counter Statement in the last sentence on page 2 of the opposing brief and evidenced by the following:

Statement by Attorney General (Counter Statement, p. 2)	Excerpt from the Decision of the State Board of March 6, 1974) (Petition, p. 42)
"On March 6, 1974 the State Board affirmed the Commissioner's decision that N.J.S.A. 18A: 14-62 does not apply to informal poll lists."	"This Board agrees with the result reached by the Commissioner, but not for the reason stated in his decision."

This transparent revision of the Board's decision together with the above listed errors, reflect a continuing refusal, on the part of the respondent to come to grips with the real issue of the matter which is whether the school election processes in the State of New Jersey are flawed to the extent that the integrity of such elections may be compromised due to the non enforcement of the directive of May 1972 pursuant to N.J.S.A. 18A: 14-18.

REPLY TO ARGUMENT

The argument of the respondent can be divided into two parts:

1. The non federal issue as stated in the Argument which is: "The Court should not grant a writ of certiorari because the sole substantive issue decided by the state appellate court involved interpretation of a state statute....." The only support for this is stated,

> "In the instant case, the sole issue of any substance was one of state law, whether the unofficial poll lists prepared by some challengers in some New Jersey school elections are subject to the non-disclosure requirements of N.J.S.A. 18A:14-62. The State Commissioner of Education concluded that such lists are not subject to the requirements of that state statute, and the State Board of Education and the state appellate court agreed."

In answer to this, petitioners' contend that the above listed errors of the Counter Statement raise a doubt as to whether the non federal issue was decided on the basis of the proper statute, thereby raising the further question of the validity of respondent's argument that the state court's decision was based on an independent and adequate non federal ground. It is evident from the errors

that the respondent misapprehended a basic fact in the case and based its argument on same. That the state court may have been swayed by the flawed argument and arrived at a decision which it might otherwise not have, had argument based on the true fact been presented, is a question which the following comparison of the issues as stated by the respondent in its brief and by the court in its decision may shed some light:

Issue in Appellate Brief, Issue, as stated by Respondent	Issue, as stated by Appellate Court (Petition, p. 33)
"The only substantive issue in both consolidated matters before this Court is whether N.J.S.A. 18A:14-62, which requires that official poll lists be sealed for one year after the election in which they are compiled, by implication imposes upon the State Board of Education the authority to require that informal challengers' lists prepared during the same election be destroyed or otherwise kept from the public for one year. This issue and its resolution are perhaps best understood by outlining the statutory school election process and the significance of poll lists within that process."	"The issue in each of the consolidated matters before us is whether N.J.S.A. 18A:14-62, which requires that official poll lists be sealed for one year after the election in which they are compiled, imposes upon the State Board of Education by implication the duty to require that informal challengers' lists prepared during the same election be destroyed or otherwise kept from the public for one year. The issue may best be understood by reference to the statutory scheme establishing the school election process and the significance of poll lists within that process."

Since the court had accepted the respondent's version of the issue practically verbatim, it is reasonable to assume that the final conclusion, having been based upon a flawed premise is also in error. An analysis of all of the above errors shows that the poll list statute (N.J.S.A. 18A:14-62) is mentioned erroneously in all of them. It is the basis for forming the pattern of thought from which the incorrect issue was deduced.

2. The federal issue as stated in respondent's Argument is:

> ".. and the only federal issue raised was not substantiated and was therefore found without merit by that court."

This statement narrows the Reply to only the federal issues raised in the state court and substantiates it by paraphrasing material from the state appellate briefs

instead of directly attacking what are essentially the same issues in the Petition. It ignores entirely items #1, #2 and #3 of the Questions Presented (Petition, pp.2-3) which are also outlined at length starting on pages 10, 13 and 17 respectively, and which do involve issues beyond the limitation of the state court decision. Since respondent's argument to the federal issues involved were addressed only to the minor number of them which were raised in the state court and did not take direct issue with any of the federal issues as stated in the Petition under Reasons for Granting Writ, petitioners contend that those issues not directly denied should stand as admitted.

JURISDICTION

This is a case where the judgment of the state court rests upon two grounds, one of which is non federal and one of which is federal.

1. As to the non federal ground:

The above errors in the Counter Statement of the opposing brief disclose that the argument and the issue propounded by the respondent with the state court, which issue was accepted by that court as the correct one (see p. 8 above) - were based on an erroneous reading of the basic directive upon which the entire complaint rests. Petitioners contend that this has

so flawed the non federal ground of the decision that it cannot stand independent of the federal ground and is not adequate to support the judgment.

2. As to the federal ground.

The Argument of the respondent states that the only federal issue raised was not substantiated and was therefore found without merit. But the actual wording of the federal issue raised by petitioners was, "The decision of the State Board of Education ..... is arbitrary and capricious in that it fails to rule on the basic issue raised, namely, the integrity of the school election processes, ..." (Petition, p. 20, par. C) (underline added)

Petitioners contend that since the non federal issue upon which the state court based its decision is patently flawed as being based on the application of the wrong statute (N.J.S.A. 18A:14-62), the petitioners' issue should have been considered as being the correct one since it was based on the application of the correct statute. (N.J.S.A. 18A-14-18). This would have resulted in the federal right to have been found meritorious and therefore this Court has jurisdiction to review on the basis that the non federal ground is so interwoven with the federal one as not to be an independent matter.

> "And this court will review the finding of facts by a state court

where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Fiske v. Kansas 274 U.S. 380, 385-6

Also Robert Satiacum v. Washington 414-US 1

CONCLUSION

In the light of the foregoing and the fact that the basic issue is one of statewide importance having to do with safeguarding the integrity of the school election processes in the State of New Jersey which control the expenditures of hundreds of millions of dollars of taxpayer funds, the need for plenary review of the decision below is urgent.

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Dated 17 October 1975